

CRIMINAL YEAR SEMINAR

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Webinar



Criminal Rules Update

Prepared By:

The Honorable David Cutchen
Presiding Judge of the Gilbert Court
&
Gary Shupe
Assistant Phoenix City Prosecutor

Distributed By:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY
COUNCIL**

3838 N. Central Ave., Suite 850
Phoenix, Arizona 85012

And

CLE WEST

5130 N. Central Ave
Phoenix, AZ 85012

2020 Criminal Year in Review
Criminal Procedure Update
Presented by APAAC and CLE West
Case summaries prepared by Gary Shupe

State v. Johnson

247 Ariz. 166, 447 P.3d 783 (2019), *cert. denied*, 2020 WL 873447 (2020)

Background

This is a capital case. The murder actually happened 10 years ago. It involved a brutal stabbing in a Mesa massage parlor.

I. Counsel issue

ARCrP 6.2(b) Appointment of Counsel for Indigent Defendants—Capital Trial Proceedings

In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b).

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

General legal principles

- Where an irreconcilable conflict or a completely fractured relationship exists between counsel and the accused, new counsel must ordinarily be appointed.
- But new counsel need not necessarily be appointed where “single allegation[s] of lost confidence,” “disagreements over defense strategies,” or less serious conflicts arose.
- Defendants bear the burden of proving that a condition warranting the appointment of new counsel exists.

Johnson, 247 Ariz. At ___, ¶ 179, 447 P.3d at 825.

A. 2015 motion for new counsel

Johnson filed a motion to change counsel before trial, requesting “any competent lawyer.”

He complained that: (1) he had asked for but not seen all motions filed on his behalf; (2) he hadn’t seen the most recent plea proposal, which included things he objected

to; (3) his attorneys weren't filing motions that were being filed by other attorneys in other capital cases; and (4) he hadn't been give copies of his mental-health records.

Johnson's attorneys countered that: (1) they hadn't sent a copy of every motion filed because they didn't have the staff to send him five years' worth of pleadings; (2) they regularly spoke with Johnson, and denied that an irreconcilable conflict with Johnson existed, (3) they had filed all appropriate motions on his behalf; and (4) they hadn't sent the mental-health records to prison to preserve the confidentiality of the records.

The trial court denied Johnson's motion. It stated that, despite complex issues, his attorneys were thorough, prepared, diligent, and worked well with opposing counsel. The court advised Johnson that changing attorneys (after five years of preparation) would be disadvantageous for him. And the court recommended that Johnson cooperate with his attorneys.

The Supreme Court characterized Johnson's complaints as minor. The Court observed that Johnson and his attorneys had worked together despite some "frustrations." *Johnson*, 247 Ariz. at ___, ¶ 183, 447 P.3d at 825.

Johnson countered that the trial court focused only on the competency of his attorneys and failed to apply all of the *LaGrand* factors—"whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel." See *State v. LaGrand*, 152 Ariz. 483, 486–87, 733 P.2d 1066, 1068–70 (1987).

The ASC noted that Johnson's attacks related to his attorneys' competency. It found that, although the trial court could have conducted a more thoroughly investigation of Johnson's claims, the court had adequately investigated them. *Johnson*, 247 Ariz. at ___, ¶ 186–87, 447 P.3d at 826.

B. 2016 motion for new counsel

During the penalty phase of Johnson's trial, he again complained about his counsel. They weren't asking the questions he wanted, didn't impeach a witness like he wanted, weren't objecting during the testimony of an expert witness as he wanted, and were overly concerned about the identity and presence at trial of one of his friends.

The ASC found no error in the trial court's denial of the motion. It concluded that his complaints were minor and related to trial strategy. The motion had been made late in the trial proceeding. And no evidence in the record showed that his

relationship with his attorneys was fractured (in fact, in an unrelated trial where the same attorneys had acted as advisory counsel for him, Johnson said that he was getting along with his attorneys and nothing about them bothered him). *Johnson*, 247 Ariz. at ___, ¶ 190, 447 P.3d at 826–27.

II. Discovery issues

A. Compelled releases

ARCrP 15.2(g) The Defendant’s Disclosures—Disclosure by Court Order

The court may order any person to provide material or information to the state if:

- the state has a substantial need for the material or information;
- the state can’t obtain the substantial equivalent without undue hardship; and
- disclosure doesn’t violate the defendant’s constitutional rights.

Before and during the trial, the state requested the defendant’s college records and an out-of-state presentence report. The state couldn’t obtain them alone. So the court ordered Johnson to sign releases for the records. Johnson objected to being compelled to sign the releases.

The ASC upheld the trial court’s order. The Court concluded that (1) the information was relevant (because it related to the defendant’s mitigation evidence, and character/criminal record), (2) the state was entitled to it, (3) none of the entities holding the records would provide the records without releases, and (4) ARCrP 15.2(g) authorized the court’s order. *Johnson*, 247 Ariz. at ___, ¶ 97, 447 P.3d at 812.

B. Disclosure of counsels’ notes

ARCrP 15.2(h)(1)(A)(ii) Additional Disclosures in a Capital Case—Initial Disclosures

The defendant must disclose “the name and address of each person . . . the defendant intends to call as a witness during the aggravation and penalty hearings, *and any written or recorded statement of the witness.*” (Emphasis added.).

When Johnson disclosed his mitigation witnesses, he provided only summaries of their statements. The state argued that Johnson was required to turn over any written statements, not just summaries.

Johnson opposed disclosure of his attorneys’ notes, arguing that they

- “were investigatory notes of the defense team,”
- “reflected counsel[s]’ opinions, conclusions, and impressions,”
- were “inaccurate because they did not reflect verbatim statements,”

- were “only quick notes of [his counsels’] own impressions of the statements,”
- and might lead to a conflict “should counsel be called to verify the veracity of any statements.”

The trial court ordered disclosure of the statements, except that opinions, theories, and conclusions could be redacted. The court allowed Johnson to seek *in camera* review as necessary for particular statements. Johnson unsuccessfully contested that order in the court of appeals by special action.

Relying on ARCrP 15.2(h)(1)(A)(ii), the ASC found no error. The Court differentiated between statements, discoverable under ARCrP 15.2(h), and work product, generally protected under ARCrP 15.4(b). Witness statements, said the ASC, did not qualify as work product. The trial court’s order allowed for redaction of any actual work product and enabled Johnson to seek *in camera* review. Moreover, Johnson failed to show that he had been prejudiced or that a constitutional violation had occurred. *Johnson*, 247 Ariz. at ___, ¶¶ 85–86, ¶¶ 90–91, 447 P.3d at 810, 811.

State v. Champagne

247 Ariz. 116, 447 P.3d 297, ¶¶ 14–21 (2019), *cert. denied*, 2020 WL 981880 (2020)

Background

This is another capital case. Champagne killed two people in his apartment. He buried them in a wooden box in his mother's back yard, where a landscaper discovered them almost two years later.

I. Counsel issue

ARCrP 6.2(b) Appointment of Counsel for Indigent Defendants—Capital Trial Proceedings

In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b).

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

General legal principals

A defendant is:

- not entitled to an attorney of his or her choice;
- not entitled to a meaningful relationship with his or her attorney;
- deprived of the right to counsel only where an irreconcilable conflict exists or the relationship with the attorney is completely fractured.

Champagne, 247 Ariz. at ___, ¶ 12, 447 P.3d at 309.

The trial court must investigate the basis of a defendant's motion to change counsel. The court's failure to adequately investigate an alleged conflict may result in reversible error. The scope of the investigation depends on the defendant's allegations.

- If the defendant alleges facts sufficient to support the motion, the court must hold a hearing.
- If the defendant's complaint amounts to differences about trial strategy, the court need not necessarily hold a formal hearing or an evidentiary proceeding.

Champagne, 247 Ariz. at ___, ¶ 13, 447 P.3d at 309.

Champagne filed a *pro per* motion to change counsel listing no real basis for having his counsel, who had been working on his case for a year and a half, removed. The lead defense attorney however told the trial court that Champagne had a "good faith basis" for the motion, that "a bona fide" conflict of interest existed because Champagne

intended to file a bar complaint against her. She orally moved to be removed, along with co-counsel. The court denied the oral motion and directed counsel, if necessary, to file a written motion. No motion was ever filed.

More than three months later, after Champagne was convicted in an unrelated trial and sentenced to over 700 years in prison, he wrote a letter to the court and again asked for new counsel. He claimed that his current counsel had fallen asleep during the trial. When speaking to the trial court about his “motion,” Champagne said that he wanted to talk to his attorneys to see if they could come to an understanding. Champagne later renewed his motion to change counsel.

The court held a hearing on the motion, during which it spoke privately with Champagne and his attorney. Champagne reiterated his claim that his attorney had fallen asleep during his unrelated trial, and he added that his attorney wasn’t visiting him or talking to him about his capital case.

Champagne’s attorney told the court that Champagne was disappointed with the result in the unrelated trial. According to the attorney, Champagne had become hostile and uncooperative, and had refused to meet with the mitigation specialist. She gave an accounting of her extensive work on Champagne’s case. She even offered to help Champagne preserve the record concerning his claim against her in the unrelated trial. She advised the court that, in her view, changing attorneys wasn’t in Champagne’s best interests. Their relationship, she said, wasn’t irretrievably broken; they could still work together to prepare for his capital trial. Afterwards, the court denied Champagne’s motion to change counsel.

On appeal, Champagne relied primarily on his attorney’s initial statements that he had a “good faith basis” for his motion to change counsel and that “a bona fide” conflict of interest existed (because Champagne had threatened to file a bar complaint). The ASC noted, however, that the attorney’s statements were contemporaneous with the threatened bar complaint. Additionally, Champagne ignored his attorney’s statements months later that 1) changing attorneys wasn’t in Champagne’s best interests, 2) their relationship wasn’t irretrievably broken, and 3) they could still work together to prepare for his capital trial. *Champagne*, 247 Ariz. at ___, ¶ 11, 447 P.3d at 309.

Though the ASC commented that the trial court could have conducted a more exacting inquiry into Champagne’s allegations, the Court held the trial court’s ruling was not an abuse of discretion. *Champagne*, 247 Ariz. at ___, ¶ 14, 447 P.3d at 310.

The ASC reviewed the trial court’s findings in light of the *LaGrand* factors to reach its determination. The *LaGrand* factors are:

- “whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict”;
- “inconvenience to witnesses”;
- “the quality of counsel”;
- “the timing of the motion”;
- “the time period already elapsed between the alleged offense and trial”; and,
- “the proclivity of the defendant to change counsel.”

See *State v. LaGrand*, 152 Ariz. 483, 486–87, 733 P.2d 1066, 1068–70 (1987).

First, the trial court found that Champagne had failed to establish the existence of an irreconcilable conflict with his attorneys. To the contrary, the trial court determined that Champagne was communicating with his attorneys and was receiving effective representation. Further, the court observed that changing counsel would likely not have changed anything. Champagne’s main complaint was that his attorneys weren’t communicating with him as often as he wanted, a circumstance that could repeat itself with new counsel.

Second, granting Champagne’s motion would have inevitably delayed trial and potentially prejudiced the state’s case. The prosecutor told the court that continuing the trial would have inconvenienced witnesses, making it difficult to get some of them to court.

Third, the court recognized that Champagne was receiving excellent representation. The court opined that lead counsel was one of the best capital defense attorneys in Arizona.

Fourth, the court found that the timing of Champagne’s motion would prejudice both the victims’ and the community’s interests in a speedy resolution to the trial. Champagne made his motion two years after committing the murders, and less than one year before trial was scheduled to begin. And the motion came only after Champagne was convicted in the unrelated case and sentence to over 700 years in prison—a trial where he was represented by his capital attorney.

The only factor in Champagne’s favor was the proclivity factor. Champagne hadn’t previously moved to change counsel. But on balance, the factors weighed against Champagne.

Champagne, 247 Ariz. at ___, ¶¶ 15–21, 447 P.3d at 310–11.

II. Supplemental argument

ARCrP 22.4. Assisting Jurors at Impasse

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the parties' presence, ask the jury to determine whether and how the court and counsel can assist the jury's deliberations. After receiving the jurors' response, if any, the court may direct further proceedings as appropriate.

Comment to ARCrP 22.4 states, in part:

Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged and a mistrial declared even though it might be appropriate and helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive, or unduly intrusive.

ARCrP 22.3(b). Repeating Testimony and Additional Instructions—Additional Instructions.

If, after the jury retires, the jury or a party requests additional instructions, the court may recall the jury to the courtroom and further instruct the jury as appropriate.

ARCrP 1.2

These rules are intended to provide for the just and speedy determination of every criminal proceeding. Courts, parties, and crime victims should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

During deliberations in the guilt phase, the jury asked for “a more detailed explanation of felony murder.” The trial court proposed giving each party five additional minutes to argue their respective positions. Champagne opposed the proposal, asserting that to do so would invade the province of the jury and interfere with deliberations. The court decided to allow the parties to argue. The prosecutor went over the elements of felony murder, the evidence that established felony murder in the state's view, and the relevant jury instructions. Champagne waived additional argument. The jury later found Champagne guilty of premeditated and felony murder.

Champagne alleged on appeal that the trial court erred by allowing supplemental argument. The ASC held that ARCrP 1.2 and 22.3(b) authorized supplemental argument under the circumstances:

Trial courts have inherent authority to assist juries and respond to jury requests for additional instructions during deliberations even when a jury is not at an impasse. Trial judges should fully and fairly respond to requests from deliberating juries when it is clear they are confused by the provided instructions. Doing so may prevent needlessly discharging juries and prematurely declaring mistrials in circumstances where it might be appropriate and helpful for judges to offer assistance.

However, we emphasize that a trial court should not order supplemental argument after a jury retires for deliberations unless the court concludes additional argument is the only way to adequately respond to the jury's request for additional instruction without inappropriately commenting on the evidence or prejudicing the parties' rights.

Champagne, 247 Ariz. at ___, ¶¶ 66–67, 447 P.3d at 319.

State v. Murray (Easton)
247 Ariz. 447, 451 P.3d 803, ¶¶ 7–9 (Ct. App. 2019)

Background

Two brothers asked the victim to store some marijuana for them. When he refused, an argument and then a fight broke out. Easton Murray tased the victim and urged his brother in Jamaican Patois to “shoot him, shoot the boy.” His brother shot the victim in the leg with a rifle. Both brothers were charged with aggravated assault with a deadly weapon, tried jointly, and convicted.

Amendment of charge

ARCrP 13.5 Amending Charges; Defects in the Charging Document—Altering Charges; Amending to Conform to the Evidence.

A preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate’s order or the grand jury indictment. Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects. The charging document is deemed amended to conform to the evidence admitted during any court proceeding. Nothing in this rule precludes the defendant from consenting to the addition of a charge as part of a plea agreement.

Easton Murray alleged that the indictment charged him with committing aggravated assault with a firearm, but the state presented evidence at trial and argued that he committed his offense with a taser. He asserted that these were two separate offenses under A.R.S. § 13-1204. As a result, he claimed that he was convicted of an offense for which he had not been given notice.

“An amendment to an indictment that instead changes the nature of the offense violates Rule 13.5(b), and a defendant’s rights under the Sixth Amendment may be violated—and fundamental error may thereby occur—if he does not receive adequate notice of such an amendment.” *Murray (Easton)*, 247 Ariz. at ___, ¶ 8, 451 P.3d ___ 808 (internal citation omitted).

The COA disagreed with Easton Murray’s characterization of the facts. The court noted that the indictment referenced a firearm, not a taser. The jurors received copies of the indictment. Although the state introduced evidence of the taser, it was to paint the picture of the altercation overall. The prosecutor didn’t argue that the taser was a deadly weapon or dangerous instrument. Rather, the prosecutor urged the jury to convict the brothers based on the use of a firearm. *Murray*, 247 Ariz. at ___, ¶ 9, 451 P.3d at 808.

State v. Murray (Easton)
247 Ariz. 447, 451 P.3d 803 (App. 2019)

&

State v. Murray (Claudius)
247 Ariz. 583, 454 P.3d 1018 (App. 2019)

Background

Two brothers asked the victim to store some marijuana for them. When he refused, an argument and then a fight broke out. Easton Murray tased the victim and urged his brother in Jamaican Patois to “shoot him, shoot the boy.” His brother shot the victim in the leg with a rifle. Both brothers were charged with aggravated assault with a deadly weapon, tried jointly, and convicted.

I. Prosecutorial Misconduct

ARCrP 19.1(b) Conduct of Trial—Order of Proceedings

- (2) the State may make an opening statement
- (4) the State must offer evidence in support of the charge
- (7) the parties may present arguments, with the State having an opening and a closing argument

General legal principles

- An appellate court does not lightly reverse a conviction due to prosecutorial misconduct.
- The court will reverse only where it’s established that misconduct occurred, and there’s a reasonable likelihood that the misconduct affected the jury’s verdict, denying the defendant a fair trial.
- The court “view[s] a prosecutor’s conduct within the context of the entire trial. . . . [But the court] will consider the cumulative effect of multiple instances of misconduct where the prosecutor engaged in persistent and pervasive misconduct and did so with indifference, if not a specific intent, to prejudice the defendant.”

Murray (Easton), 247 Ariz. at ___, ¶ 18, 451 P.3d at 810; *id.* (internal citations and quotation marks omitted).

Murray (Claudius), 247 Ariz. at ___, ¶¶ 8–9, 454 P.3d at 1024.

A. Nationality

In their separate appeals, both Murrays claimed that the prosecutor improperly brought up the brothers’ Jamaican nationality in his opening statement and when

examining the victim. They contended that it was improper because it invoked stereotypes the jurors may have possessed about Jamaicans and marijuana. The COA found that the state's argument and evidence were proper because it was relevant to identity. A witness to the assault heard the brothers speaking in a foreign language. The victim testified that he and the Murrays spoke in Jamaican Patois. That fact tended to implicate the brothers who were from Jamaica and spoke in Jamaican Patois. *Murray (Easton)*, 247 Ariz. at ___, ¶ 30, 451 P.3d at 812–13; *Murray (Claudius)*, 247 Ariz. at ___, ¶¶ 11–12, 454 P.3d at 1024–25.

B. Reasonable-doubt standard

The brothers argued that the prosecutor misrepresented the burden of proof. The prosecutor said at one point in closing argument:

So here is how to think when you might hear somebody say back there, well, I think one or both defendants *might be guilty* but I'm not sure it's beyond a reasonable doubt. Now, stop and ask yourself another question at that point. Why did I just say that? Why did I just say that I think the defendants might be guilty? You are a fair and impartial juror. If you are thinking that, if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt? Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt. That's why you think as you do being fair and impartial.

Murray (Easton), 247 Ariz. at ___, ¶ 32, 451 P.3d at 813 (emphasis added).

The COA agreed that the prosecutor had misstated the *Portillo* reasonable-doubt standard: “when these words are boiled down to their essentials, what remains is an argument that a belief a defendant might be guilty constitutes belief in guilt beyond a reasonable doubt. This misrepresents the reasonable-doubt standard, under which a juror must be firmly convinced of the defendant's guilt to find the defendant guilty.” *Murray (Easton)*, 247 Ariz. at ___, ¶ 32, 451 P.3d at 813; *Murray (Claudius)*, 247 Ariz. at ___, ¶¶ 42–44, 454 P. 3d at 1031.

Still, the COA determined that the brothers suffered no prejudice. The prosecutor had misstated the burden of proof once but had correctly stated it other times. Moreover, the trial court had properly instructed the jurors on reasonable doubt and provided the instruction in writing to them, directing them to be guided by it. And the court instructed the jurors that arguments of counsel weren't evidence. Jurors are presumed to follow instructions. Nothing in the record rebutted that presumption.

Murray (Easton), 247 Ariz. at ___, ¶¶ 33–34, 451 P.3d at 813–14; *Murry (Claudius)*, 247 Ariz. at ___, ¶¶ 45–46, 454 P. 3d at 1031–32.

State v. Mendoza
248 Ariz. 6, 455 P.3d 705 (App. 2019)

Background

The state charged Mendoza with two counts of aggravated DUI. At a status conference—the date that the state’s plea offer was to expire, defense counsel told the trial court that Mendoza wanted “to discuss the case” with the court. The court agreed to do so and informed Mendoza about the charges and the plea offer (nine years’ imprisonment).

After that, though, the conversation turned to settlement discussions. The court offered its viewpoint on Mendoza’s chance of getting a better sentence, if convicted, than the one being offered by the state:

Okay. So, Mr. Mendoza, after trial you would face 6 to 15. That six is completely, 100 percent unreasonable. There is not a judge here that will give you six, period. The fact that you’ve already done seven and a half on a vehicular aggravated assault . . . means someone’s going to give you more. Okay? And seven and a half on a vehicular aggravated assault and then coming back with essentially what looks like a third felony DUI type activity, when you already assaulted somebody, like—no.

* * *

Your chances of getting nine after trial are literally about zero. Your chances of getting 10 are extremely low. Your chances of getting above 10 like the 12, 13, 14, 15, that’s—it’s [a] better chance you get that than you get ten or nine for sure.

I can’t imagine anyone giving you less than the presumptive when you’ve already been to prison for seven and a half years related to a vehicular assault and you’ve got another Agg DUI and you’re here for another Agg DUI, and you go to trial because when you go to trial, you also lose the mitigation of acceptance of responsibility, remorse, saving taxpayer time, court time, saving money for the courts. You lose all of that that goes in the good pile.

Okay. When you go to trial, that just doesn’t exist. Okay? So when you go to trial, you have less in the good pile. When we’re weighing the good and the bad, and if you have less in the good pile, the stuff in the bad pile weighs heavier. Does that make sense?

A colloquy then occurred between the court and the defendant without much participation from the attorneys:

THE COURT: If you are convicted at trial, you will get more than nine years. So your plea offer may save you some time. It might not be what you want, but they're not going to give you something better.

[MENDOZA]: I'm by myself, Your Honor, so if I get 10 years, I get 10 years. . . . I have no family. When my mom died my family just—just disowned me and not supported me.

THE COURT: And your time is not worth anything? You'd rather just spend your years in prison?

[MENDOZA]: I was an electrician for—I was an electrician for the prison so I worked the whole time I was there.

THE COURT: Oh, so you like prison?

[MENDOZA]: I don't like it, but I don't like—just I'm putting pretty much a gun to my head. Either do or die.

THE COURT: No, you're right. You're pretty much in the same spot as everybody else in here when they have to decide on a plea.

[MENDOZA]: I made a mistake, Your Honor. I can't change the past. But unfortunately—

THE COURT: Well, you can't but you can try to minimize the damage. But if you want to go to prison for longer, you let me know at sentencing because I'll be happy—

[MENDOZA]: I don't.

THE COURT: —to send you for 15 and have no problem with it.

[MENDOZA]: I don't want to, that's why I (indiscernible) and maybe do some understanding. I'm not saying that I'm not guilty. I'm just understanding—

THE COURT: I'm telling you after trial, your chances of getting below 10 are about zero. And not just from me, from about anyone.

Mendoza rejected the state's offer. He was convicted at trial. The presentence report recommended a ten-year sentence. The judge who had participated in the impromptu settlement conference and then presided over Mendoza's trial sentenced Mendoza. The judge rejected the presentence report. The judge observed that there were several aggravating factors and ordered Mendoza to serve nearly thirteen years in prison.

Mendoza's appellate counsel filed an *Anders* brief. Concerned that error had occurred, the COA asked the parties to address “whether the superior court judge who ultimately presided over Mendoza's trial violated Rule 17.4(a)(2) by participating in the settlement discussions . . . without obtaining the consent of the parties and, if so, what remedy existed for a violation of the rule.” *Mendoza*, 248 Ariz. at ___, ¶ 7, 455 P.3d at 712.

I. Settlement conference

ARCrP 17.4. Plea Negotiations and Agreements—Judicial Participation

At either party's request or on its own, a court may order counsel with settlement authority to participate in good faith discussions to resolve the case in a manner that serves the interests of justice. The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. If settlement discussions do not result in an agreement, the case must be returned to the trial judge.

The state argued that Mendoza implicitly consented to the settlement conference when his counsel told the trial court that Mendoza wanted to discuss the case. The COA rejected that argument, finding defense counsel's statement too ambiguous to amount to consent. And the COA noted that the trial court, not Mendoza, "crossed the line into settlement discussions . . . by going beyond a simple explanation of the charges and the potential sentences and expressing [its] opinion on the sentence Mendoza would receive were he convicted after trial." *Mendoza*, 248 Ariz. at ___, ¶ 17, 455 P.3d at 715.

Mendoza did not allege, nor did the COA find, that he had received an unfair trial despite the fact that the same judge participated in both the settlement discussions and the trial. The COA found, however, that it was error for the judge to have imposed the maximum sentence partially because Mendoza had rejected the state's offer. The record, held the COA, established that Mendoza's sentence was likely the result of judicial vindictiveness. *Mendoza*, 248 Ariz. at ___, ¶ 23, 455 P.3d at 716–17; *id.*, 248 Ariz. at ___, ¶¶ 32–33, ¶ 35, 455 P.3d at 719, 720.

The COA stressed that it did not believe that the court had acted out of personal hostility toward Mendoza. Rather, the COA used the phrase *judicial vindictiveness* as a term of art to describe the court's legal error:

We do not presume the [trial court]'s intentions were improper, but the fact remains that [it] clearly and repeatedly departed from its critical role as a neutral arbiter by: (1) urging Mendoza to accept the plea offer to save him some time in his sentence and avoid a trial [it] indicated he had no chance of winning; and (2) promising to impose a sentence no lower than the presumptive sentence, 10 years, if Mendoza chose to go to trial. *Mendoza*, 248 Ariz. at ___, ¶ 33, 455 P.3d at 719.

The COA concluded that the proper remedy was to remand the case to a different judge for resentencing. *Mendoza*, 248 Ariz. at ___, ¶ 41, 455 P.3d at 721.